

Agency determination in question may have resulted from bad faith or improper behavior.

(1) Prior to any such determination, the Administrative Law Judge must permit SBA to respond in writing to any allegations of bad faith or improper behavior.

(2) Upon a determination by the Administrative Law Judge that the petitioner has made such a substantial showing, the Administrative Law Judge may permit appropriate discovery, and accept relevant evidence beyond the written administrative record, which is specifically limited to the alleged bad faith or improper behavior.

(b) A determination by the Administrative Law Judge that the required showing set forth in paragraph (a) of this section has been made does not shift the burden of proof, which continues to rest with the petitioner.

[63 FR 35766, June 30, 1998, as amended at 67 FR 47251, July 18, 2002]

§ 134.408 Summary decision.

(a) *Generally.* In any appeal under this subpart D, either party may move or cross-move for summary decision, as provided in § 134.212.

(b) *Summary decision based on fewer than all grounds.* If SBA has provided multiple grounds for the 8(a) determination being appealed, SBA may move for summary decision on one or more grounds.

(1) *Non-suspension cases.* Except in suspension appeals, if the Judge finds that there is no genuine issue of material fact as to whether SBA acted arbitrarily, capriciously, or contrary to law as to any such ground or grounds, and that the SBA is entitled to a decision in its favor as a matter of law, the Judge will grant the motion for summary decision and dismiss the appeal.

(2) *Suspension cases.* In suspension appeals, if the Judge finds that there is no genuine issue of material fact as to whether adequate evidence exists that protection of the Federal Government's interest requires suspension, as to any such ground or grounds for the proposed suspension, the SBA is entitled to a decision in its favor as a matter of law, and the Judge will grant the mo-

tion for summary decision and dismiss the appeal.

[67 FR 47251, July 18, 2002]

§ 134.409 Decision on appeal.

(a) A decision of the Administrative Law Judge under this subpart is the final agency decision, and is binding on the parties.

(b) The Administrative Law Judge shall issue a decision, insofar as practicable, within 90 days after an appeal petition is filed.

(c) The Administrative Law Judge may reconsider an appeal decision within 20 days of the decision if there is a clear showing of an error of fact or law material to the decision.

[63 FR 35766, June 30, 1998. Redesignated and amended at 67 FR 47251, July 18, 2002]

Subpart E—Rules of Practice for Appeals From Service-Disabled Veteran Owned Small Business Concern Protests

SOURCE: 70 FR 8927, Feb. 24, 2005, unless otherwise noted.

§ 134.501 What is the scope of the rules in this subpart E?

(a) The rules of practice in this subpart E apply to all appeals to OHA from formal protest determinations made by the Associate Administrator for Government Contracting (AA/GC) in connection with a Service-Disabled Veteran-Owned Small Business Concern (SDVO SBC) protest relating to the status or ownership or control of the SDVO SBC, as set forth in § 125.26 of this chapter. This includes appeals from determinations by the AA/GC that the protest was premature, untimely, nonspecific, or not based upon protestable allegations.

(b) Except where inconsistent with this subpart, the provisions of Subpart A and B of this part apply to appeals listed in paragraph (a) of this section.

(c) Appeals relating to formal size determinations and NAICS Code designations are governed by Subpart C of this part.

§ 134.502 Who may appeal?

Appeals from SDVO SBC protest determinations may be filed with OHA by

the protested concern, the protester, or the contracting officer responsible for the procurement affected by the protest determination.

§ 134.503 When must a person file an appeal from an SDVO SBC protest determination?

Appeals from an SDVO SBC protest determination must be commenced by filing and serving an appeal petition within 10 business days after the appellant receives the SDVO SBC protest determination (see § 134.204 for filing and service requirements). An untimely appeal will be dismissed.

§ 134.504 What are the effects of the appeal on the procurement at issue?

The filing of an SDVO SBC appeal with OHA stays the procurement. However, the contracting officer may award the contract after receipt of an appeal if the contracting officer determines in writing that an award must be made to protect the public interest. A timely filed appeal applies to the procurement in question even though a contracting officer awarded the contract prior to receipt of the appeal.

§ 134.505 What are the requirements for an appeal petition?

(a) *Format.* There is no required format for an appeal petition. However, it must include the following information:

- (1) The solicitation or contract number, and the name, address, and telephone number of the contracting officer;
- (2) A statement that the petition is appealing an SDVO SBC protest determination issued by the AA/GC and the date the petitioner received the SDVO SBC protest determination;
- (3) A full and specific statement as to why the SDVO SBC protest determination is alleged to be based on a clear error of fact or law, together with an argument supporting such allegation; and
- (4) The name, address, telephone number, facsimile number, and signature of the appellant or its attorney.

(b) *Service of appeal.* The appellant must serve the appeal petition upon each of the following:

(1) The AA/GC at U.S. Small Business Administration, 409 3rd Street, SW., Washington, DC 20416, facsimile (202) 205-6390;

(2) The contracting officer responsible for the procurement affected by an SDVO SBC determination;

(3) The protested concern (the business concern whose SDVO SBC status is at issue) or the protester; and

(4) SBA's Office of General Counsel, Associate General Counsel for Procurement Law, U.S. Small Business Administration, 409 3rd Street, SW., Washington, DC 20416, facsimile number (202) 205-6873.

(c) *Certificate of Service.* The appellant must attach to the appeal petition a signed certificate of service meeting the requirements of § 134.204(d).

§ 134.506 What are the service and filing requirements?

The provisions of § 134.204 apply to the service and filing of all pleadings and other submissions permitted under this subpart unless otherwise indicated in this subpart.

§ 134.507 When does the AA/GC transmit the protest file and to whom?

Upon receipt of an appeal petition, the AA/GC will send to OHA a copy of the protest file relating to that determination. The AA/GC will certify and authenticate that the protest file, to the best of his or her knowledge, is a true and correct copy of the protest file.

§ 134.508 What is the standard of review?

The standard of review for an appeal of a SDVO SBC protest determination is whether the AA/GC's determination was based on clear error of fact or law. With respect to status determinations on whether the owner is a veteran, service-disabled veteran, or veteran with a permanent and severe disability, the Judge will not review the determinations made by the U.S. Department of Veteran's Affairs, U.S. Department of Defense, or such determinations identified by documents provided by the U.S. National Archives and Records Administration.